IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A.No.2537 of 2002
Date of Decision: 28 .08.2006

SMT. BAKSHISH KAUR

.....APPELLANT

VERSUS

GURMEJ SINGH

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE MAHESH GROVER.

Present: **MR. O.P.GOYAL, SR. ADVOCATE,**
WITH MS. MAMTA B.JAIN,ADVOCATE,
FOR THE APPELLANT.

MR. NARESH PRABHAKAR,ADVOCATE,
FOR THE RESPONDENT.

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MAHESH GROVER,J.

The defendant-appellant has filed the present Regular Second Appeal assailing the judgments and decrees passed by the learned trial Court dated 19.02.1996 and by the learned lower appellate Court dated 14.03.2002.

Briefly stated, the facts of the case are that Gurmej Singh, plaintiff-respondent filed a suit of possession for a specific performance of an agreement dated 28.10.1992 alleged to have been executed by the appellant on her behalf as well as on behalf of her husband, namely Gurdev Singh. According to this agrement to sell, the sale was to be executed on 15.06.1993. The total sale consideration was fixed at Rs.7.95,185/- out of which Rs.1,00,000/- were paid as earnest money and rest was to be paid at the time of execution of the sale deed. One of the stipulations in the sale agreement was that the appellant was required to refund the earnest money and pay damages to the tune of Rs, 1,00,000/- in the event of any default committed by her pursuant to the contract of sale and the normal clause of forfeiture of the earnest money was there in case the respondent

committed default in the performane of his part of the contract.

The appellant did not deny the execution of the sale agreement in so far as her share was concerned, but denied that she has executed any agreement to sell on behalf of her husband. It was denied that she has any authority to execute any sale transaction on behalf of her husband. It was also denied that on 15.06.1993 the respondent ever came present in the office of Sub-Registrar with the balance sale consideration to perform his part of the agreement.

Broadly on these pleadings, the trial Court framed the following issues:-

1. Whether the defendant executed an agreement to sell the suit land on 28.10.1992, for a consideration and received Rs. One lac towards the earnest money if so its efect?OPP.
2. Whether the plaintif had been and is ready and willing to perform his part of the contract if so its effect?OPP.
3. Whether the plaintiff is entitled to the recovery of Rs. Two lacs in the alternative?OPP.
4. Whether the suit has been filed through competent attorney?OPP.
5. Whether the suit is not maintainable in the present form?OPD.
6. Relief.

The trial Court, thereafter went on to decree of the suit of the respondent for possession by way of specific performance of the agreement only in respect of the share of the appellant and the respondent was directed to pay half of the total sale consideration of Rs.7,95,185/- within a period of three months after deducting amount of Rs.1,00,000/- paid as earnest money. The appellant was

directed to execute the regular sale deed within a period of four months.

The appellant filed an appeal before the learned Lower Appellate Court and the findings of the trial Court were affirmed and the appellant was directed to execute the sale deed within a period of two months on taking the balance sale consideration as directed by the trial Court.

Still dissatisfied with the judgment of the learned courts below, the appellant has filed the present appeal.

It was contended by Sh. O.P.Goyal, learned senior advocate appearing on behalf of the appellant, that both the courts have failed to appreciate the fact that it was the respondent who had failed to perform his part of the agreement and there is no sufficient evidence to show that he was ever present on 15.06.1993 for the purposes of execution of the sale deed. No notice was given to the appellant, whereas she had presented herself on 15.06.1993 before the office of Sub-Registrar. It was further contended that the respondent had executed power of attorney in favour of Gurmej Singh S/o Banta Singh and this fact was not intimated to the appellant and, therefore, she was not aware as to whether the respondent was ever present on the stipulated date or not?

On the other hand, leanred counsel for the respondent Shri Naresh Prabhakar contended that there is sufficient evidence to show that the respondent was present in the office of Sub-Registrar on 15.06.1993 along with requisite amout for the purpose of executing the sale deed but the appellant never came present. He further contended that in any case, the only question sought to be decided in the present appeal is as to whether the appellant was willing and ready to perform her part of the agreement, which is a finding of fact concurrently recorded by both the courts below in his favour and in regular second appeal, these questions of fact cannot be gone into. In support of his contention, he relied upon the judgment of Hon'ble Supreme Court, reported as ***A.I.R. 2001 SC 2920*** , wherein it has been held as follows:-

> *"The question of law formulated as substantial question of law in the instant cse cannot, in any way, be termed to be a question of law much less as substantial question of law. The question formulated in fact is a question of fact. Merely because of appreciation of evidence another view is also possible would not clothe the High Court to assume the jurisdiction by terming the question as substantial question of law. In this case Issue No.1, as framed by the trial Court, was, admittedly, an issue of fact whcih was concurrently held in favour of the appellant-plaintiff and did not justify the High Court to disturb the same by substituting its own finding for the findings of the Courts below, arrived at on appreciation of evidence".*

I have heard the learned counsel for the parties and have perused the record.

There is no denial to the agreement and also to the fact that the amount of Rs.1,00,000/- was paid as earnest money. The only question that has been sought to be raised by the appellant in the present appeal is that the respondent had defaulted in performing his part of the agreement and he was ever ready and willing to carry out the execution of his part of the contract. A perusal of the record, however, shows to the contrary. PW1 Gurdip Singh has testified that Gurmej Singh withdrawn Rs.7,00,000/- on 15.06.1993 vide Cheque No.274153 from the Central Coop. Bank, Jagatpur Jattan. Gurmej Singh while appearing as PW6 has stated that he remained present in the Tehsil Court on 15.06.1993 for getting the sale deed executed. He also stated that he got the affidavit Ex. PW4/1 and PW5/1 swearing therein that he was present on 15.06.1993 before the office of Sub-Registrar. All these facts would show that respondent was always ready and

willing to get the sale deed executed but it was the appellant who was at default.

In any case, these are findings of fact and the judgment of the Apex Court (supra) is straightway attracted to the facts of the present case.

These being questions of fact cannot be gone into in Regular Second Appeal. No substantial questions of law is shown to hve been arisen in the present case.

Faced with this situation, the learned counsel for the appellant then contended that he was willing to return the double amount provided that the execution of the sale deed is not enforced. In support of his contention, he stated that the courts below did not explore the possibility of granting the discretionary relief under Section 20 of the Specific Relief Act. In support of his contention, he relied upon a judgment of Hon'ble Supreme Court in ***Rajeshwari v. Puran Indoria 2005(7) SCC 60*** , to say that whether discretion could have been exercised in law by the court under the provision of Specific Relief Act is a substantial question of law and, therefore, interference by this court to limited extent can be warranted in Regular Second Appeal. The Hon'ble Supreme Court has observed as under:-

> "*Normally, a suit for specific performance of an agreement for sale of immovable property involved the following questions:(1) whether the plaintiff was ready and willing to perform his part of the contract in terms of Section 16 of the Specific Relief Act, 1963, (2) whether it was a case for exercise of discretion by the court to decree specific performance in terms of Section 20 of the Specific Relief Act, and (3) whether there were laches on the part of the plaintiff in approaching the court to enforce specific performance of the contract. In some cases, a question of limitation may also arise in the context of Article 54 of the* Limitation Act, 1963 on the terms of the agreement for sale. Other questions like the genuineness of the agreement,

abandoning of the right to specific performance, a novation and so on, may also arise in somecases. No doubt, a finding on the three primary aspects indicated above would depend upon the appreciation of the pleadings and the evidence in the case in the light of the surrounding circumstances. These questions, by and large, may not be questions of law of general importance. But they cannot also be considered to be pure questions of fact based on an appreciation of the evidence in the case. They are questions of fact which have to be adjudicated upon, in the context of the relevant provisions of the Specific Relief Act and the Limitation Act (if the question of limitation is involved). Though an order in exercise of discretion may not involve a substantial question of law, the question whether a court could, in law, exercise a discretion at all for decreeing specific performance, could be a question of law that substantially affects the right of parties in that suit. Therefore, in the case on hand, the High Court was not justified in dismissing the second appeal in the manner in which it has done".

Reflecting back to the facts of the present case, the appellant has abandoned his case for specific performance of the agreement and has only prayed for recovery of the amount. Once the respondent has been shown to be ready and willing to perform his part of the agreement then the appellant cannot enforce his right to recover the amount and no discretion can be exercised in his favour. This Court in a judgment reported as **1978 P.L.R, 773** is held as follows:-

"Where it was found that the defendant-Vendor was always ready and willing to execute his part of the agreement but the plaintiff-Vendee was not agreeable to get the document

executed and pay the remaining consideration on the ground that the plaintiff should be given possession of the property at the time of registration.

Held, that as the plaintiff-Vendee had committed breach of the agreement because the clause regarding delivery of possession was an interpolation made by the plaintif-vendee in the agreement of sale subsequently, he was not entitled either to specific performance of the contract or damages".

There is no doubt about the above proposition of law but the discretion has to be exercised by the courts keeping in view the facts in mind. The appellant after executing the agreement has simply defaulted without showing any cause for the same. No hardship was shown to the court which could warrant the interference by them under the provisions of the Specific Relief Act. The appellant cannot be permitted to take benefit of her own wrong and deprive the respondent of his valuable right to enforce the contract. The respondent was present with the money which has come on record. It is, therefore, absolutely no reason why he should be deprived of the property to which he was entitled to in pursuance to the agreement to sell which has been duly established on record.

For the foregoing reasons, the appeal being devoid of any merit is dismissed and the judgment of the learned Lower Appellate Court is maintained. The appellant is directed to execute the sale deed within a period of two months from the date of passing of this judgment.

August 28, 2006 **(MAHESH GROVER)**
nt **JUDGE**